

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 DENNIS MARC GRIGSBY,

Case No. 2:16-cv-01886-APG-CWH

4 *Petitioner,*

ORDER

5 vs.

6
7 DWIGHT NEVEN, *et al.*,

8 *Respondents.*
9

10 This habeas matter under 28 U.S.C. § 2254 comes before the Court on respondents' motion
11 (ECF No. 9) to dismiss along with petitioner's motion (ECF No. 23) for appointment of counsel, motion
12 (ECF No. 24) for expansion of the record, and motion (ECF No. 25) for an evidentiary hearing.

13 ***Background***

14 Petitioner Dennis Grigsby challenges his 2009 Nevada state conviction, pursuant to a jury
15 verdict, of first-degree murder with the use of a deadly weapon and possession of a firearm by an ex-
16 felon, in connection with the April 2, 2008, murder of Anthony Davis in Clark County, Nevada. He
17 is serving a sentence on the murder charge of life without the possibility of parole plus a consecutive
18 term of 60 to 240 months on the weapon enhancement, and he also was sentenced to a concurrent
19 sentence of 16 to 72 months on the weapon possession charge. (ECF No. 15-10; Exhibit 28.)

20 Petitioner challenged his conviction on both direct appeal and in a timely state post-conviction
21 petition.

22 ***Motion to Dismiss***

23 Respondents contend that federal claims presented in Grounds 1, 2, 4 and 5 are not exhausted
24 and that Grounds 2, 4 and 5 otherwise present only state law claims that are not cognizable in federal
25 habeas corpus. Respondents further contend that Ground 9 presents a noncognizable claim of alleged
26 error in the state post-conviction proceedings that also in any event is unexhausted.

27 With regard to Grounds 1, 2, 4 and 5, petitioner states that he does not oppose respondents'
28 position as to these grounds; and he "specifically request[s] that Grounds 1, 2, 4 and 5 be excluded from

1 federal habeas corpus review of [the] pending petition.” (ECF No. 22, at 5, lines 16-17 & 19-23; see
2 also *id.*, at 8, lines 13-14.)¹ The Court accordingly will dismiss Grounds 1, 2, 4 and 5 without
3 prejudice.²

4 Petitioner does challenge respondents’ position as to Ground 9.

5 In Ground 9, petitioner alleges that he was denied rights to due process and equal protection in
6 violation of, *inter alia*, the Fifth and Fourteenth Amendments because the state supreme court issued
7 an allegedly premature order of affirmance on the state post-conviction appeal when an evidentiary
8 hearing had been scheduled in the state district court on a number of grounds in a superseding state
9 petition.

10 Ground 9 presents a claim of procedural error in state post-conviction proceedings that is not
11 cognizable on federal habeas review. The Court has jurisdiction under 28 U.S.C. § 2254 only over a
12 collateral challenge to a state court judgment of conviction. The Court otherwise does not have
13 jurisdiction to entertain collateral attacks on other types of judgments; and a federal district court does
14 not exercise appellate or supervisory jurisdiction over the state courts. Accordingly, claims of
15 procedural error in state post-conviction proceedings are not cognizable in a federal habeas corpus
16 proceeding, even when such claims are based on the federal constitution. *See, e.g., Franzen v.*
17 *Brinkman*, 877 F.2d 26 (9th Cir. 1989). As with claims of federal constitutional error regarding other
18 state court judgments, such claims may be pursued only via *certiorari* review in the Supreme Court.

19 The Court expresses no opinion at this juncture as to whether the circumstances alleged in
20 Ground 9 may be relevant to other procedural issues on federal habeas review, notwithstanding that the
21 ground is not cognizable as an independent claim.

22 The Court accordingly will grant respondents’ motion to dismiss and dismiss Grounds 1, 2, 4,
23 5 and 9 without prejudice.

25 ¹All page citations are to the page number in the electronic header generated by CM/ECF rather than to any
26 internal page numbering in the original document.

27 ²While petitioner thereby thus seeks to dismiss also the Sixth Amendment claim presented in Ground 1, it is his
28 decision to make also as to the exhausted and cognizable claims that he seeks to pursue herein. (See ECF No. 7, at 3-4.)
(See also ECF No. 15-14, at 2, Exhibit 32, as to the disposition of the claim on direct appeal.)

1 ***Remaining Motions***

2 The Court will deny petitioner's second motion (ECF No. 23) for appointment of counsel for
3 the reasons assigned previously in denying his first motion. (See ECF No. 6, at 1-2.) While petitioner
4 is subject to a lengthy sentence, he has demonstrated an adequate ability to present his claims and
5 arguments with the resources available to him. The claims and issues presented are not unduly
6 complex.

7 Petitioner seeks appointment of counsel to conduct discovery, hire an investigator and expert
8 witnesses, and present evidence at a federal evidentiary hearing. However, as noted further below,
9 federal habeas review generally is limited to the record in the state court proceedings. Discovery is not
10 generally conducted in federal habeas proceedings, and the issues usually are addressed without either
11 a federal evidentiary hearing or consideration of expert testimony or other evidence developed and
12 presented for the first time on federal review rather than in the state courts.³

13 To the extent that petitioner relies upon prior decisions from this Court concerning law library
14 access or resource issues at other state institutions at particular times in years past, this Court never
15 has held that either the amount of law library access and/or the prison legal mail procedures at High
16 Desert State Prison constitute a basis for automatic appointment of federal habeas counsel. Petitioner,
17 again, has demonstrated an adequate ability to present his claims and arguments with the resources
18 available to him at the prison.

19 The second motion for appointment of counsel therefore will be denied.

20 The motions (ECF Nos. 24 and 25) to expand the record and for an evidentiary hearing also will
21 be denied on the showing made. Federal habeas review generally is limited to the record presented to
22 the state courts. *E.g., Cullen v. Pinholster*, 563 U.S. 170 (2011).

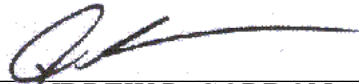
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24 ³The Court notes that during the post-conviction proceedings in the state district court, the then-represented
25 petitioner in proper person sought and obtained an order to instead represent himself in those proceedings. (See ECF
26 Nos. 17-3 to 17-5; Exhibits 46-48.) He thereafter represented himself in the district court and beyond through the
27 conclusion of the post-conviction appeal. If petitioner needed counsel, investigators, expert witnesses, and such to
28 adequately develop and present his claims, he perhaps would have been better served to not decline counsel in the state
post-conviction proceedings so that he could develop the record presented to the state courts in the first instance, before
he filed an appeal. That was his determination to make, however. *Cf. Fareta v. California*, 422 U.S. 806 (1975). In all
events, petitioner has demonstrated a sufficiently adequate ability to present his claims and arguments within the context
of a federal habeas proceeding with the resources available to him.

1 **IT THEREFORE IS ORDERED** that respondents' motion (ECF No. 9) to dismiss is
2 **GRANTED**, that Grounds 1, 2, 4 and 5 are **DISMISSED** without prejudice at petitioner's direction,
3 and that Ground 9 is **DISMISSED** without prejudice as noncognizable.

4 **IT FURTHER IS ORDERED** that petitioner's motion (ECF No. 23) for appointment of
5 counsel, motion (ECF No. 24) for expansion of the record, and motion (ECF No. 25) for an evidentiary
6 hearing all are **DENIED** on the showing and arguments made.

7 **IT FURTHER IS ORDERED** that, within **sixty (60) days** of entry of this order, respondents
8 shall file an answer to the remaining grounds in the petition and that petitioner shall have **sixty (60)**
9 **days** from service of the answer within which to dispatch a reply to the Clerk.

10 Dated: January 9, 2018.

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15 ANDREW P. GORDON
16 United States District Judge
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